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No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, WARDEN,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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Other Authorities Cited

Bator, Finality and Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) 7,9

Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981) 7

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 30 U. Chi. L. Rev. 142 (1970) 9

Robinson, An Emperical Study of Federal Habeas Corpus Review of State Court Judgments (Office for Improvements in the Administration of Justice, U.S. Dept. of Justice, 1979) 14,15,16

Robinson, Allen & Schachatman, Federal Habeas Corpus And Its Reform: An Emperical Analysis, 13 Rut. L. J. ____, No. 2 (1981) 14

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Yackle, Post-Conviction Remedies, (Lawyers Co-op 1981) 10

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

A Mixed Petition For Habeas Relief Must Be Dismissed Because Of The Exhaustion Requirement.

Summary

The Respondent suggests that the exhaustion requirement of 28 U.S. Code § 2254(b) can be applied by a federal court at its discretion after balancing the competing interests between the

state and its prisoner.[1] This presumes that application of the exhaustion requirement is a matter of discretion rather than of power, as the State contends. The Respondent's contention eviscerates the exhaustion requirement as a jurisdictional limitation upon federal habeas review over state criminal proceedings.

Since Congress instituted the process of collateral review over state court convictions it is clearly within the prerogative of Congress to limit such federal review by first requiring that the prisoner resort to his state remedies:

> That [federal habeas] statute requires exhaustion of available state remedies as a pre-condition to *consideration* of a federal habeas petition . . ..
>
> * * * * * * *
>
> Under our decision in Picard v. Connor . . ., exhaustion of state remedies is required as a *prerequisite to consideration* of each claim sought to be presented in federal habeas [petitions] . . ..

Pitchess v. *Davis*, 421 U.S. 482, 486-487 (1975) [emphasis added].

The exhaustion doctrine was originally a judicially-crafted device designed to show deference to state sovereignties, giving them the intitial opportunity to rule upon a prisoner's federal constitutional claims. *Ex parte Royall*, 117 U.S. 241 (1886). Though the doctrine was originally couched in discretionary terms, *id.* at 251, it soon became apparent that the "discretion" of federal courts was illusory, for whenever the writ was granted prior to exhaustion of state remedies (and where none of the so-called special circumstances involving interference with federal

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[1] Brief for Respondent at 12.

government operations existed) this Court reversed and ordered the petition dismissed.[2]

This exhaustion requirement was codified in 1948[3] and translated the "discretionary" exhaustion doctrine into a jurisdictional limitation on federal habeas powers. To safeguard this jurisdictional limitation, and the principles undergirding it, this Court denounced any development of the exhaustion requirement which would allow for piecemeal habeas litigation. *E.g., Murch* v. *Mottram,* 409 U.S. 41, 45-46 (1972).

Requiring exhaustion of all claims before reviewing the merits of any habeas claims does not close the federal door to the state prisoner—it merely prevents the state from being dragged through a revolving door of federal review after each individual claim is presented to the state courts. Judged by the paucity of successful habeas petitions it is obvious that it is the states which are exhausted by the present rules of application among federal courts rather than any meritorious petitioner.[4]

A. The Exhaustion Requirement is a jurisdictional limitation upon federal habeas review.

In *Fitts* v. *McGhee,* 172 U.S. 516 (1899) it was recognized that federal habeas jurisdiction over state convictions was derived solely from Congress.

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[2] *See, e.g., Baker* v. *Grice,* 169 U.S. 284, 291 (1898); *Fitts* v. *McGhee,* 172 U.S. 516, 532 (1899); *Minnesota* v. *Brundage,* 180 U.S. 499, 500-01 (1901) (granting of writ reversed and petition ordered dismissed even though Court deemed claim of unconstitutionality of state statute an issue of great importance); *New York* v. *Eno,* 155 U.S. 89, 98 (1894); *Urquhart* v. *Brown,* 205 U.S. 179, 181 (1907). When the writ was denied without exhaustion of state remedies this Court reversed and ordered dismissal of the petition. *E.g., United States ex rel Kennedy* v. *Tyler,* 269 U.S. 13 (1925).

[3] Act of June 25, 1948, ch. 646, 62 Stat. 967, presently codified in 28 U.S. Code § 2254(b).

[4] Only 3% of these petitions are meritorious. See text accompanying n. 16, *infra.*

> Undoubtedly, the courts of the United States have the power, *under existing legislation,* by writ of habeas corpus, to discharge from custody any person held by state authorities under criminal proceedings . . . .

Ibid., at 532 [emphasis added]. *See Preiser* v. *Rodriguiz,* 411 U.S. 475, 485 (1973); *Stone* v. *Powell,* 428 U.S. 465, 474-475 (1976). The "existing legislation" referred to in *Fitts* was the Habeas Corpus Act of 1867.[3] The exhaustion doctrine, as crafted by the Supreme Court in *Ex parte Royall, supra,* later became inbedded into the overall Congressional grant of federal habeas review powers over state criminal proceedings in 1948. 28 U.S. Code § 2254(b) - (c) (1970).

The long-held view that federal habeas review power was derived solely from Congress was later brushed aside in *Fay* v. *Noia,* 372 U.S. 391 (1963). The Court, in dictum, made the misleading assertion that

> [t]he rule of exhaustion "is not one defining power but one which relates to the appropriate exercise of power." *Bowen* v. *Johnston,* 306 U.S. 19, 27 (1939).

Ibid., 372 U.S. at 420 [citation omitted]. The quotation cited, which was lifted out of context from the *Bowen* case, pertained not to exhaustion of state remedies but rather to the exercise of power by one federal court over another federal court's criminal judgment. Additionally, the *Fay* Court erroneously analogized to the *Royall* line of "exhaustion" cases which dealt only with the *discretion* of a federal court to conduct habeas review. After codification of the exhaustion requirement in 1948 this *discretion* was translated into a limitation of *power. See Fay* v. *Noia, supra,* at 455 (Harlan, J., dissenting).

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[3] Act of Feb. 5, 1867, ch. 28, § I, 14 Stat. 385, presently codified in 28 U.S. Code § 2241.

The *Fay* Court, in an attempt to support the above quoted dicta, went on to say that federal habeas review over *state* criminal proceedings actually stemmed from the common law.

> [T]he breadth of the federal courts' power of . . . habeas corpus stems from the very nature of the writ . . ..

Fay v. *Noia, supra,* at 422 [footnoted omitted].

The *Fay* Court completely ignored prior decisions of this Court which had held that the Act of 1867 was the sole source of federal habeas jurisdiction over state criminal proceedings. *E.g., Fitts* v. *McGhee,* 172 U.S. 516, 532 (1899). As this Court observed long ago, there was no common law power of federal habeas review over criminal proceedings.[6]

> [T]he power to award the writ [of habeas corpus] by any of the courts of the United States must be given by *written law.*

Ex parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) [emphasis added]. The State urges this Court to reject the dicta in *Fay* which has spawned the present review of mixed petitions for habeas relief among the federal courts.[7]

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[6] *See, Schneckloth* v. *Bustamonte,* 412 U.S. 218, 255 (1973) (Powell, J., concurring) (federal habeas review for state prisoners was not available until passage of the Habeas Corpus Act of 1867). Neither did the Suspension Clause create any constitutional power in federal courts to issue the writ over state prisoners. The Clause merely prohibited Congress from suspending the issuance of a *state* writ. *See, e.g., Swain* v. *Pressley,* 430 U.S. 372, 384 (1977) (Burger, C. J., concurring); *Bounds* v. *Smith,* 430 U.S. 817, 835 (1977) (Burger, C. J., and joined by Blackmun, J., dissenting) (criticizing the dicta in *Fay* v. *Noia*). *Accord, ibid.,* at 837 (Stewart, J., dissenting); *ibid.,* at 837-838 (Rehnquist, J., dissenting).

[7] *E.g., United States ex rel Graham* v. *Mancusi,* 457 F.2d 463, 468 (2d Cir. 1972); *United States ex rel. Gockley* v. *Myers,* 411 F.2d 216, 219 (3d Cir. 1969); *Hill* v. *Beto,* 390 F.2d 640, 641 (5th Cir. 1968).

Some circuit courts have nevertheless held that a federal court *must* determine whether the exhaustion requirement has been satisfied, notwithstanding a concession by the state or the dicta in *Fay*.

> [N]either the concession nor waiver [of the exhaustion requirement] relieves the federal court of the responsibility to decide only those habeas claims which Congress has authorized it to hear under § 2254 (b).

United States ex rel. Trantino v. *Hatrack*, 563 F.2d 86, 96 (3d Cir. 1977), *cert. denied*, 435 U.S. 928.[8]

The jurisdictional limitation of exhaustion of state remedies as imposed by Congress reflects the understanding that state courts will naturally uphold and enforce the federal constitution.[9]

> [F]rom the very nature of their judicial duties they [state judges] would be called upon to pronounce the law applicable to the case in judgment. They were not to decide

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[8] *See, e.g., Bufalino* v. *Reno*, 613 F.2d 568 (5th Cir. 1980); *Connor* v. *Auger*, 595 F.2d 407, 413 (8th Cir. 1979) *en banc*; *Davis* v. *Campbell*, 608 F.2d 817 (8th Cir. 1979); *Needel* v. *Scafati*, 412 F.2d 761, 765-766 (1st Cir. 1969), *cert. denied*, 396 U.S. 861; *United States ex rel. Lockett* v. *Illinois Parole and Pardon Board*, 600 F.2d 116 (7th Cir. 1979).

[9] State judges in Tennessee are bound under the state constitution to enforce the federal constitution. Tenn. Const., art. X, § 1. In fiscal year 1981 the Tennessee Court of Criminal Appeals decided 637 cases; 55 criminal judgments of state trial courts were reversed, and of this number 26 were reversed on federal constitutional grounds. During the same time period the Tennessee Supreme Court decided 20 criminal cases, reversing 13 judgments of state trial courts, of which 6 reversals were on federal constitutional grounds. These figures are taken from the official records of the Tennessee Attorney General who acts as the Reporter of Decisions for Tennessee appellate courts. Tenn. Code Ann. § 8-6-109(7).

> merely according to the constitution of the state, but according to the constitution, laws and treaties of the United States . . ..

Martin v. *Hunters Lessee,* 14 U.S. (1 Wheat.) 304, 340-41 (1816). *Accord, Robb* v. *Connolly,* 111 U.S. 624, 637 (1884). This judicial duty was accepted by the early colonies as a natural responsibility of all state judges.

> From the beginning it was one of the central features of our federalism that federal law *is* a part of the state law, that deciding federal questions is an intrinsic part of the business of state judges.
>
> * * * * * * * *
>
> Implicit in the whole structure [of criminal law) is the need for confidence that the state courts will conscientiously apply to a case the *whole* of the applicable law, including the federal law.

Bator, *Finality and Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 510-511 (1963) [footnotes omitted]. *See also,* Bator, *The State Courts and Federal Constitutional Litigation,* 22 Wm. & Mary L. Rev. 605, 614 (1981).

Therefore, after granting federal courts the power to review state criminal proceedings in 1867, Congress later limited that power by adding the exhaustion requirement of section 2254(b). *Cf., Summer* v. *Mata,* ____ U.S. ____, 101 S.Ct. 764, 769, n. 2 (1981) ("the 1966 amendments in §2254(d) were intended by Congress as limitations on the exercise of [habeas] jurisdiction.").

B. The Exhaustion Requirement does not permit piecemeal habeas review.

The Respondent asserts, however, that in spite of the development of federal habeas review powers Congress must have intended to permit repetitious habeas actions by permitting review of "mixed" petitions for habeas relief.[10] Respondent pleads that state prisoners should be permitted to promptly present their mixed petitions for habeas relief to the federal courts thereby allowing review of only the exhausted claims, leaving the petitioner to return later with his unexhausted claims; the prisoner then returns to federal court with the previously unexhausted claims and with perhaps even more new claims which may or may not be exhausted.

The fallacy of Respondent's position, which is followed in most federal circuits, is illustrated by its results. Permitting review of mixed petitions produces an attitude that criminal convictions are never final and that federal habeas corpus is nothing more than an endless process of piecemeal review over state criminal convictions.

> [I]t is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating the law will swiftly and certainly become subject to punishment, just punishment. Yet this threat may be undermined if at the same time we so define the processes leading to just punishment that it can really never be finally imposed at all. *A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands.* Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders.

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[10] Brief for Respondent at 10.

Bator, *supra,* 76 Harv. L. Rev. at 452 [emphasis added].

Did Congress intend to permit piecemeal review of state criminal proceedings by allowing review of mixed petitions as the Respondent suggests? Such is clearly repugnant to the consistent federal policy against fragmentary habeas litigation. *E.G., Murch* v. *Mottram,* 409 U.S. 41, 45-46 (1972). The statutory rule which protects the writ from being abused by repetitious filings suggests that finality is indeed a proper consideration governing habeas review of state criminal convictions. *See* Rule 9, Rules Governing Section 2254 Cases, 28 U.S. Code foll. § 2254.

1. Allowing review of mixed petitions actually increases the number of petitions filed.

Twenty-eight years ago, Justice Jackson, in his concurring opinion in *Brown* v. *Allen,* 344 U.S. 443, 532, 536 (1953), expressed deep concern over the

> floods of stale, frivolous and repetitious petitions [for federal habeas relief by state prisoners which] inundate the docket of the lower courts and swell our own.

The petitions at that time totaled 541. As Chief Judge Friendly later noted:

> If 541 annual petitions for federal habeas corpus by state prisoners were an "inundation" what is the right word for 7,500?

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 30 U. Chi. L. Rev. 142, 144 (1970).

The inundation of habeas petitions upon federal district courts has resulted in an ad hoc application of the exhaustion doctrine which is contrary to the manner in which the exhaustion doctrine is consistently applied in this Court. Justification

for this departure among numerous federal courts is based on notions of judicial economy or of the meritorious petitioner's need for prompt federal habeas review.[11]

The number of habeas filings by state prisoners has dramatically increased since the decision in *Brown* v. *Allen, supra.* In 1980, 7,031 petitions for habeas relief were filed by state prisoners.[12] In an effort to meet this swelling tide of habeas petitions the federal courts have applied the exhaustion requirement in an inconsistent manner depending upon whether or not they want to review the merits of the petition. *See* Yackle, *Post-Conviction Remedies,* § 53, p. 235 (Lawyers Co-op 1981) (suggesting that its application is often result oriented). There are simply not enough judicial resources to properly decide whether each claim in each petition has been exhausted; it is often easier to deny the petition on the merits rather than to sort through the procedural questions presented by mixed petitions.

2. The rule which dismisses mixed petitions only when the claims are interrelated is unworkable and disregards the principles of the exhaustion requirement.

One of the methods employed by circuit courts (following the lead of the Second Circuit) in applying the exhaustion requirement to mixed petitions is to permit review only when the exhausted and unexhausted claims are not interrelated.[13] While

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[11] Even though the Fifth Circuit seemingly has a strict rule disallowing habeas review of mixed petitions, concerns over judicial economy and promptness in the review process has been held to justify ignoring this local requirement, *See, Houston* v. *Estelle,* 569 F.2d 372 (5th Cir. 1978); *Van Poyck* v. *Wainwright,* 595 F.2d 1083, 1086 (5th Cir. 1979).

[12] 1980 Annual Report of Director of Administrative Office of the U.S. Courts, p. 62, Table 21.

[13] See *Miller* v. *Hall,* 536 F.2d 967 (1st Cir. 1976); *United States ex rel. Levy* v. *McMann,* 394 F.2d 402 (2d Cir. 1968); *United States ex rel. Trantino* v. *Hatrack,* 563 F.2d 86 (3d Cir. 1977), *cert. denied,* 435 U.S. 928; *Hewett* v. *North Carolina,* 415 F.2d 1316 (4th Cir. 1969); *Tyler* v. *Swenson,* 483 F.2d 611 (8th Cir. 1973); *Watson* v. *Patterson,* 358 F.2d 297 (10th Cir. 1966).

this approach may reflect more deference to principles of comity, it is unworkable and has led to patently inconsistent results as each court struggles to determine when habeas claims are interrelated.[14]

Searching these "interrelated claims" decisions for some certitude as to when exhausted and unexhausted claims are "interrelated" is like navigating through the Sargasso Sea. The quest for a standard definition becomes mired in the sea of inconsistency. The doctrine of interrelation, as crafted by the Second Circuit, is unworkable and actually imposes another burden upon a federal court; not only must it decide whether a claim has been exhausted but it must also decide whether the mixed claims are interrelated.

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[14] Cf.: United States ex rel. *Levy* v. *McMann*, 394 F.2d 402 (2d Cir. 1968) (first claim that denial of due process occurred when the State called witness it knew would refuse to testify and second claim that right of confrontation was denied petitioner who could not cross-examine witness claiming privilege are not interrelated); *United States ex rel. DeFlumer* v. *Mancusi*, 380 F.2d 1018 (2d Cir. 1967) (claim of coerced confession is interrelated with claim of unconstitutionality of statute under which defendant convicted; test of interrelation is whether resolution of unexhausted claim would necessarily affect resolution of exhausted claim); *Miller* v. *Hall*, 536 F.2d 967, 969 (1st Cir. 1976) (only where remedies for the mixed claims are interrelated must the petition be dismissed, citing *DeFlumer*); *United States ex rel. Trantino* v. *Hatrack*, 563 F.2d 86, 91, n. 15 (3d Cir. 1977) (claim of competency to stand trial and aid in one's defense are not interrelated with claims of ineffective assistance of counsel and denial of exculpatory evidence pertaining to plaintiff's regime of drugs given to him prior and during trial which affected his ability to aid in his defense); *Johnson* v. *United States District Court*, 519 F.2d 738 (8th Cir. 1975) (per curiam) (claim of voluntariness of guilty plea is interrelated with claim of ineffective assistance of counsel and claim of lack of mental competence at trial); *Shipwash* v. *Collins*, 475 F. Supp. 1001 (W.D. Va. 1979) (unexhausted claim of defective jury instruction on presumption is not interrelated with claim of prosecutorial misconduct regarding same inference).

3. Requiring dismissal of all mixed petitions will not unfairly impact upon meritorious petitions.

Through those decisions permitting habeas review of mixed petitions is weaved a common thread: many federal courts resist the proper application of the exhaustion rule on the ground that the delay is unfair to the meritorious petitioner who should be entitled to prompt federal review of his habeas corpus claims.[15] This approach puts the cart before the horse and ignores the reality that very few petitions are indeed meritorious.

The following table[16] reflects the number of successful habeas petitions over the past three fiscal years and demonstrates that finding the meritorious petitioner is indeed like searching the "haystack for a needle". *Brown* v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

Fiscal Years	No. of § 2254 Cases Decided by District Courts	No. of Cases Decided in Favor of Prisoner	% Successful
1979	6,648	228	3.43%
1980	6,599	220	3.33%
1981	7,302	250	3.42%

These figures are similar to the success rates noted in *Brown* v. *Allen*, 344 U.S. 443, 537, n. 11 (1953) (1946 - 2.8%; 1952 -1.8%).

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[15] *See, Galtieri* v. *Wainwright*, 582 F.2d 348, 373 (5th Cir. 1978) (Goldberg, J., dissenting).

[16] These statistics were secured from the Director of the Administrative Office of the U.S. Courts upon request by the undersigned Assistant to the Tennessee Attorney General.

The above statitstics refute the Respondent's argument that requiring exhaustion of all claims as a pre-condition to federal habeas review will constitute "an indiscriminate firing of the blunderbuss." Brief for Respondent at 15. After all, was it a "firing of the blunderbuss" when this Court reversed the granting of the writ for lack of exhaustion after the lower court had declared as unconstitutional the statute under which the prisoner had been convicted, *Minnesota* v. *Brundage,* 180 U.S. 499, 500-01 (1901); or when this Court reversed the granting of a writ for lack of exhaustion when the lower courts found that the prisoner had been denied certain exculpatory evidence prior to trial, *Pitchess* v. *Davis,* 421 U.S. 482, 486-87 (1975)? When 97% of all petitions are without merit can it be seriously argued that requiring complete exhaustion of state remedies for all claims will have a severe impact upon state prisoners?

4. Requiring dismissal of mixed petitions would complement the present procedures for habeas review.

Requiring dismissal of a "mixed" petition would fit neatly within the overall scheme of existing habeas review procedures enacted by Congress and declared by this Court. This would provide a much needed rule of procedure to federal judges and magistrates who are presently struggling over the appropriate method for reviewing mixed petitions. Such a rule does not close the federal courthouse door to state prisoners—it merely keeps the door from revolving continuously for the same prisoner.

Before reviewing the *merits* of a habeas petition, a federal court should proceed through the following steps:

> 1. the claims for habeas relief should be dismissed *sua sponte,* unless they constitute claims which are cognizable on habeas corpus;[17]

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[17] 28 U.S. Code § 2243; Rule 4, Rules Governing 2254 Cases, 28 U.S. Code foll. § 2254.

2. the petition should be dismissed if the exhaustion requirement has not been satisfied as to *all* cognizable claims unless compliance has been properly excused;[18]

3. these cognizable claims which have satisfied the exhaustion requirement should be dismissed if the claims have been forfeited under state law.[19]

Only when the above procedures have been followed should a federal court review the merits of a habeas petition.

5. Requiring dismissal of mixed petitions will eliminate piecemeal habeas litigation.

If a federal court would only strictly and consistently adhere to the above jurisdictional limitations as imposed by Congress the repetitious habeas litigation which now besets the federal courts could be eliminated. In a 1979 report commissioned by the United States Department of Justice[20] [hereafter 1979 Justice Department Report] it was found that in those federal district courts surveyed[21] which strictly enforced the exhaustion

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[18] 28 U.S. Code § 2254(b), (c).

[19] *See Wainwright* v. *Sykes,* 433 U.S. 72 (1977).

[20] P. Robinson, An Emperical Study of Federal Habeas Corpus Review of State Court Judgments (Office for Improvements in the Administration of Justice, U.S. Department of Justice 1979). Professor Robinson's findings in this report are further analyzed in the upcoming article, Robinson, Allen & Schachatman, *Federal Habeas Corpus And Its Reform: An Emperical Analysis,* 13 Rut. L. J. ____, No. 2 (1981), where he concludes from the data that strict enforcement of the exhaustion requirement causes prisoners to resort to state courts before seeking federal relief.

[21] The district courts surveyed in the 1979 report were the Eastern District of Pennsylvania, District of New Jersey, Eastern District of Virginia, Northern District of Illinois, Central District of California and Southern District of California.

requirement the number of procedurally defective filings was actually *reduced.*[22] These findings refute the arguments of critics who claim that state prisoners are somehow too ignorant to understand that state review of their federal claims is a precondition to federal habeas review. *See, e.g., Galtieri* v. *Wainwright,* 582 F.2d 348, 369 (5th Cir. 1978) (Goldberg, J., dissenting). The simple message declared in those federal district courts which strictly and consistently enforce the exhaustion doctrine is understood by prisoner and lawyer alike: first present all your claims in the state court or you will always have your federal habeas petition dismissed.

Ironically, the concerns for judicial enonomy which cause some federal courts to prematurely review the *merits* of "mixed" habeas petitions actually spawn and multiply the filing of defective petitions.[23] Even worse, in those federal circuits which require total exhaustion of all habeas claims the rule is undercut by permitting appellate review on the *merits* where the district court has erroneously reviewed the merits of the "mixed" petition.[24] This shortsighted approach, urged by the Respondent, no doubt encourages a district court to ignore the exhaustion requirement and proceed with reviewing the merits of a habeas petition when it knows that it will not be reversed on the procedural point. It is like acceding to the cries of a child to avoid the temporary pain of immunization--in the short run the choice brings temporary relief, but in the long run the disease is certain to rear its ugly head, sometimes proving to be fatal.

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[22] Robinson, *supra* note 20, at 20, n. 20.

[23] *Ibid.*

[24] *See Carothers* v. *Rhay,* 594 F.2d 225, 228-229 (9th Cir. 1979); *Galtieri* v. *Wainwright,* 582 F.2d 348, 362 (5th Cir. 1978) *en banc.* This standard of appellate review is in complete derogation of this Court's own precedents *E.g., Minnesota* v. *Brundage,* 180 U.S. 499 (1901); *Pitchess* v. *Davis,* 421 U.S. 482 (1975).

As the 1979 Justice Department Report illustrates, the ugly head of piecemeal habeas litigation will continue to rise unless the exhaustion requirement is strictly and consistently enforced as a pre-condition to federal habeas review. Contrary to the single "question" petitions which were prevalent in 1948, mixed petitions are now the norm in habeas litigation. The report found that 78.2% of the petitions surveyed had more than one claim while more than 50% of the petitions contained three or more claims for habeas relief.[25] Although Congress used the term "question" in requiring exhaustion of state remedies, such term cannot be interpreted so as to allow review of mixed petitions, a result Congress could not have contemplated in 1948. Nothing in § 2254(b), the state of the law at the time of its adoption, or the historical uses of the term "question" compels a conclusion that Congress envisioned and intended this result.

When a federal court ignores the exhaustion requirement and prematurely reviews a mixed petition a tremendous burden is also imposed upon the states. In these cases states are routinely called upon to produce copies of state trial transcripts and appellate pleadings in order to permit federal review of habeas petitions, a burden noted in the 1979 Justice Department Report.[26] Allowing review of mixed petitions particularly aggravates this burden because review of even one exhausted claim (*e.g.*, sufficiency of evidence) requires production of the entire transcript and defense by the state of the entire case.[27]

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[25] Robinson, *supra* note 20, at 11.

[26] Robinson, *supra* note 20, at 22.

[27] *See, e.g., Brown* v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring). It was because of this burden that the petitioner only filed a portion of the multi-volume state trial transcript since the habeas petition referred to specific portions of the trial transcript dealing with the four claims of habeas relief. (J.A. 71-75).

The impact of this case upon the present federal habeas review process will be great, indeed. Lower federal courts should be given specific directions from this Court as to the proper disposition of mixed petitions in such away that the exhaustion requirement will not become evicerated. A bright-line rule requiring dismissal of mixed petitions is a natural and logical extension of the exhaustion requirement which is a jurisdictional limitation upon the powers of federal courts.

II.

The Prosecutorial Misconduct Did Not Constitute Egregious Misconduct Such That It Deprived Lundy Of A Fair Trial.

Lundy's second claim for habeas relief was based on the prosecuting attorney's statement to the trial judge that certain testimonial evidence was being offered to prove Lundy's "violent nature". (J.A. 17, 72). The district court expanded this claim to include numerous other instances of prosecutorial misconduct which had never been fairly identified or presented to the Tennessee courts. Brief for Petitioner at 25. The Respondent argues that the Tennessee courts considered the issues of prosecutorial misconduct. Brief for Respondent at 19. However, this ignores the fact that the only acts of prosecutorial misconduct which were identified and fairly presented to the state courts consisted of the "violent nature" remark as well as those remarks concerning the respondent's trial counsel. (J.A. 43-48, 58, 60-61).

The State contends that the Court of Appeals erroneously applied the standard of federal *supervisory* review rather than the very limited scope of habeas review delineated by this Court in *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974). A different panel of the Sixth Circuit Court of Appeals acknowledged this difference in *Summit* v. *Bordenkircher,* 608 F.2d 247, 253, n. 4 (6th Cir. 1979) and held that a state prosecutor's disparaging remarks about the character of the accused were not per se un-

constitutional, though noting that the same remarks would be tantamount to reversible error under the court's supervisory powers. *See, e.g., Cobb* v. *Wainwright,* 609 F.2d 754, 755 (5th Cir. 1980) ("*Donnelly* teaches that in a Section 2254 proceeding more than undesirability or even 'universal condemnation' must be shown.").

What the Respondent ignores when he claims that the "violent nature" remark impaired his right to a fair trial is that the state trial judge quickly instructed the jury to disregard the remark. (J.A. 23). The remark was isolated, immediately cured by cautionary instructions to the jury, and occurred during a point in the trial where the defense counsel had adequate opportunity to militate its effect. These are the factors, among others, which justified the conclusion of the Tennessee Court of Criminal Appeals that the remark was harmless beyond a reasonable doubt. (J.A. 58). The Court of Appeals erred by failing to discuss why these factors were insufficient to render the remark harmless. *See* 28 U.S.C. § 2254(d).

The state contends that its courts are clearly capable of deciding when prosecutorial misconduct violates one's federal constitutional rights, as the case of *State* v. *Hicks,* 618 S.W.2d 510 (Tenn. Crim. App. 1981) illustrates. The cavalier attitude of federal courts towards the factual findings of harmless error by state courts derogates the jurisdictional limitations imposed by Congress.

III.

The Limitation Upon Lundy's Cross-Examination Of The Rape Victim Did Not Violate His Right Of Confrontation.

The Respondent's objections to the state trial judge's limitation upon his right to cross-examine the rape victim is based upon a purely hypothetical result. Brief for Respondent at 22. He theorizes that had the state trial court permitted his fruitless

cross-examination he might have successfully discredited the rape victim's testimony and seriously impaired the strength of the State's case. This ignores the fact that the record clearly reveals that the line of examination (whether the rape victim had made contradictory statements to the defense counsel in a pretrial interview about her previous acts of unchasity) was fruitless. The rape victim testified, in the presence of the jury, that she could not recall making the alleged prior contradictory statements. (J.A. 7). As noted by the Respondent the State's objection to this question was sustained, but the tenor of the ruling reflects that the trial court was only addressing the form of the question and not the substance of the victim's answer.

Even assuming *arguendo* that the rape victim's answer to the foundation question was not properly before the jury, the Court of Appeals should not have ignored the other portions of the record where the state trial judge permitted the defense counsel, during a jury-out hearing, to pursue this fruitless line of examination. (J.A. 24-25). The jury-out hearing reflects that the defense counsel could not make the *foundation* answers relevant because he could not prove the ultimate fact, *i.e.*, that the contradictory statements were made. *See* VI *Wigmore on Evidence,* § 1871 (Chad. Rev. 1976).

If Lundy is to be granted a retrial it is clear that this collateral examination will not be admissible under present state evidentiary law, which now protects a rape victim from being examined concerning prior acts of unchasity. Tenn. Code Ann. § 40-2445 (Supp. 1980). Such rape shield statutes have been upheld as not being violative of the constitutional right of confrontation. *E.g., Rozell* v. *Estelle,* 554 F.2d 229 (5th Cir. 1977), *cert. denied,* 434 U.S. 942 (holding that *Davis* v. *Alaska,* 415 U.S. 308 (1974) is inapplicable). If the ultimate facts (lack of chastity) could not be proved on retrial it is obvious that the alleged contradictory statements about the same would likewise be inadmissible.

CONCLUSION

The State of Tennessee requests that the judgments of the lower courts be vacated and the petition be dismissed.

Respectfully submitted,

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